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Institutionalization: Savior or Saboteur of Mediation?,

Abstract

This article is a reflection on the history and spread of the field of alternative dispute resolution (ADR). The author focuses on the increased institutionalization of ADR – particularly in relation to mediation within the court system, with examples drawn from Florida's experience.

Keywords

Mediation -- Florida

Disciplines

Dispute Resolution and Arbitration

INSTITUTIONALIZATION: SAVIOR OR SABOTEUR OF MEDIATION?*

SHARON PRESS**

As we celebrate the tenth anniversary of the creation of the Florida Dispute Resolution Center, it is only fitting that we should critically reflect on what has happened in the field of dispute resolution.¹ Many wonderful and exciting trends have occurred in the alternative dispute resolution (ADR) arena during the past fifty years—many of which have taken place within the last decade, both in Florida and nationally. We have seen not only increased usage of ADR terminology in the press and popular magazines, but also more widespread independent use of ADR processes. The President of the United States routinely deploys mediators to assist with international crises, ballplayers routinely seek arbitration to resolve contract disputes, and students nationwide, some as young as elementary school age, participate in peer mediation programs. The use of these processes has become so increasingly pervasive that the “alternative” of ADR is increasingly being dropped in favor of such terms as “complementary,” “additional,” “appropriate,” or simply “dispute resolution.”³

* My thoughts on this topic have been greatly enhanced by my participation on a panel at the annual meeting of the Association of American Law Schools (AALS) in January 1994, discussing “What Happens When Mediation Is Institutionalized? To the Parties, Practitioners, and Host Institutions,” and my participation in a Festschrift in March 1994, honoring Robert Coulson upon his retirement from the American Arbitration Association. Special thanks to Dean James Alfini and Professor Jean Sternlight, who reviewed drafts of this Article, and to Professor Joseph Stulberg, who invited me to participate in the Festschrift.

** Director, Florida Dispute Resolution Center. B.A., George Washington University, 1983; J.D., National Law Center, George Washington University, 1986. The author has worked for the last eight years at the Center, which is a joint program of the Florida Supreme Court and Florida State University College of Law. Under her direction, the Florida court-connected dispute resolution program has been widely recognized as being on the cutting edge of issues related to institutionalization. In addition to conducting training and staffing the two supreme court committees on mediation and arbitration, the author is a director on the Board of the Society of Professionals in Dispute Resolution (SPIDR) and teaches a course in mediation at the Florida State University College of Law.

1. The Center was formed with the dual goals of conducting research and education in the field of ADR and promoting the use of mediation and other alternative processes, particularly in the court system—i.e., institutionalization. The Center has been remarkably successful in achieving its institutionalization goal; Florida now boasts one of the most comprehensive court-connected mediation programs in the country. Nevertheless, in our zeal to concentrate on the actual implementation of programs, our research arm has not been as prolific, although the Center’s research publications include JAMES J. ALFINI ET AL., *FLA. DISP. RESOL. CTR., SUMMARY JURY TRIALS IN FLORIDA: AN EMPIRICAL ASSESSMENT* (1989) and KARL D. SCHULTZ, *FLA. DISP. RESOL. CTR., FLORIDA’S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT* (1990).

2. See 1 TASK FORCE ON DISP. RESOL., N.J. SUPREME COURT, 1988 JUDICIAL CONFERENCE DISCUSSION PAPER 6 (1988) (opting for the use of complimentary dispute resolution (CDR) rather than the more traditional ADR).

3. Interestingly, some of mediation’s greatest supporters are not in favor of dropping the “alternative” from the description of ADR because they fear that by doing so, the

In my mind, however, one of the most exciting and challenging developments for practitioners in the past ten years has been the increased institutionalization of ADR—particularly in relation to mediation within the court system. Spreading ADR processes has been a goal many who are committed to the field have pursued with great vigor. As the old cliché reminds us, however, “be careful what you wish for.” The growth and development of mediation and other dispute resolution processes in institutional settings, while certainly producing more exposure and interest in these processes, has also brought with it a host of concerns I believe worthy of thought and discussion. This issue holds particular interest for me because I have not only benefited directly from this institutionalization, but have also been actively involved in promoting and overseeing the institutionalization of ADR within the court system in Florida.

When I entered this field, the law school career service center had no “alternative” positions on file, and my family and friends did not understand what I was planning to do. Today, most people have at least a passing familiarity with the processes of mediation and arbitration (even if they sometimes confuse them). Even traditional law firms now understand the significance of “alternative” processes. Increasingly, clients are demanding changes in the traditional way that disputes are resolved. Recently, even the American Bar Association, in an effort to keep pace with the increased viability of alternative processes, upgraded the status of its Dispute Resolution Standing Committee to a permanent section.⁴

As I discuss the issue of institutionalization, it is important to have a common frame of reference. For the purposes of this Article, I use the term “institutionalization” to refer to any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations. My discussion will focus primarily on the institutionalization of court mediation programs, with examples drawn from Florida’s experience because that is what I know best; however, I believe that many of the same opportunities and concerns raised are readily transferable to other institutions. To me, Florida’s experience with court-connected mediation can serve as a case study for how and why bureaucracies develop.

process will become just like more traditional methods of dispute resolution—expensive, time-consuming, and not necessarily just. For purposes of clarity in this Article, I will continue to use “ADR” as shorthand to identify these processes.

4. See AMERICAN BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, 1993 MIDYEAR MEETING 4 (1993).

Institutionally, Florida entered the ADR movement in the mid-1970s with the establishment of "citizen dispute settlement" (CDS) centers and pilot divorce mediation programs within the trial courts.⁵ The CDS centers are similar to the neighborhood justice centers of other jurisdictions and handle disputes (mostly minor criminal, neighborhood-type disputes) that are voluntarily brought by the individuals involved in the disputes. The model pursued for the Florida CDS centers, after the initial ones came into being, centered around local development with strong support from the Office of the State Courts Administrator (OSCA) and the Chief Justice of the Florida Supreme Court. OSCA conducted research on the programs, produced training and organizational manuals,⁶ and pursued the adoption of legislation⁷ to promote the establishment of these programs, many of which had strong ties to the local court system.

Some argued that this development was not in keeping with the primary goal of the CDS movement, which was to empower those in the local community to resolve issues for themselves.⁸ On the other hand, these programs would not have spread as quickly or completely had it not been for the Florida Supreme Court's support. The research conducted by OSCA provided the data to show that the programs worked, the organizational manuals provided the step-by-step information on how to establish programs, and the training manuals and guidelines provided some measure of consistency and quality control that led to confidence in the program. Looking around the nation, one finds that these programs have flourished primarily in those states in which the courts provided an institutional home, established institutional frameworks, and promoted the use of these

5. For a more complete history of the development of Florida's experience in establishing a statewide, court-connected mediation program, see Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029 (1993).

6. See JOSEPH B. STULBERG, SUPREME COURT OF FLA., INSTRUCTOR'S GUIDE FOR TRAINING MEDIATORS FOR SERVICE IN CITIZEN DISPUTE SETTLEMENT PROGRAMS (1981).

7. Statutory authority for CDS programs was pursued as early as 1976. See SARAH SCHULTZ ET AL., FLA. DISP. RESOL. CTR., FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM 262 (9th ed. 1996). It was finally adopted in 1985. See Act effective June 19, 1985, ch. 85-228, § 2, 1985 Fla. Laws 1237, 1237-39 (codified as amended at FLA. STAT. § 44.201 (Supp. 1996)).

8. The proposed National Institute of Law Enforcement and Criminal Justice Design for Neighborhood Justice Centers have the following objectives: (1) to establish in the community an efficient mechanism for the resolution of minor criminal and civil disputes that stresses mediation and conciliation between the parties in contrast to the findings of fault or guilt that characterize the traditional adjudication process; (2) to reduce court caseloads by redirecting cases that are not appropriate for the adversarial process; (3) to enable the parties involved in the disputes to arrive at fair and lasting solutions; and (4) to serve as a source of information and referral for disputes that would be more appropriately handled by other community services or government agencies. See DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 197 (1977).

processes.⁹ I believe there is a direct correlation. In Florida, the CDS programs thrived when the supreme court focused attention on the program.¹⁰ When attention shifted from the CDS programs toward the court programs, no new programs were established and many of those that were in existence expanded to include court cases. Within a few years, the bulk of the CDS centers' cases had shifted away from communities and towards the courts.¹¹ This shift is not surprising, based upon the difficulty CDS or neighborhood justice centers have in generating cases. Because the number of cases that a community center actually mediates is significantly lower than the number of cases that are scheduled (due to the inherent difficulty in getting both parties to attend a completely voluntary process), the centers face a continuing challenge, resulting in disappointingly low caseloads.¹²

As part of its effort for the future, the Florida Supreme Court appears to be refocusing attention on neighborhood justice centers, and we once again are beginning to see an increase in the caseload numbers and a renewed commitment to the concept of neighborhood/community justice.¹³ In 1995, a Neighborhood Justice Center opened in Tallahassee and has received attention from the Governor and the Chief Justice of the Florida Supreme Court.¹⁴

9. For example, New York state now has established community dispute resolution centers in all 62 of its counties. See COMMUNITY DISP. RESOL. CTRS. PROGRAM, UNIFIED COURT SYS. OF THE STATE OF N.Y., 1995 FISCAL YEAR ANNUAL REPORT 1 (1996).

10. In 1986, when the first compendium of mediation and arbitration programs was published, there were 15 CDS programs, three small claims programs, and two circuit court civil mediation programs. See BRENDA DUANE & MIKE BRIDENBACK, FLA. DISP. RESOL. CTR., FLORIDA MEDIATION PROGRAMS: A COMPENDIUM 2 (1st ed. 1987). In 1995, there were "14 CDS programs, 26 county mediation programs, 23 family mediation programs, nine circuit civil mediation programs and five arbitration programs." SARAH SCHULTZ ET AL., *supra* note 7, at v. This graphically demonstrates the growth of mediation overall, as well as the shift from community, pre-suit mediation to a court-filed focus.

11. In 1995, the Dade County community dispute resolution program, which was one of the pioneer programs in Florida, closed due to lack of funding. One of the reasons cited was the caseload, which was low compared with the court-connected mediation programs. A troubling corollary in this regard is being repeated in California, where firmly established community programs are being included in the state's legislative efforts to institutionalize court mediation programs.

12. See Sally Engle Merry, *Defining "Success" in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 172 (Roman Tomasic & Malcolm M. Feely eds., 1982).

13. In his 1996 public swearing-in, Chief Justice Gerald Kogan of the Florida Supreme Court stated, "The biggest thing that I believe in is access to the courts." *Kogan Sets Priorities for Term as Chief Justice*, FULL COURT PRESS (Fla. Off. of the State Courts Adm'r, Tallahassee, Fla.), July/Aug. 1996, at 1.

14. The Neighborhood Justice Center was funded partly by an "innovation grant" from the Dispute Resolution Center. This ironic turn of events underscores the cyclical nature of this field in which the forerunner of the comprehensive dispute resolution program in Florida would, twenty years later, be seen as an innovative approach to dispute resolution.

If we start from the premise that mediation and other alternative processes provide a positive means of resolving disputes, then it seems to follow that providing for the more rapid spread and more comprehensive use of these processes would also be a positive step. As practitioners, we have longed for more cases to be referred to mediation so more disputants can benefit from the empowerment possibilities of mediated disputes (and also so there is enough work for us to pursue our chosen field). Institutionalization certainly focuses attention on the processes, and it can be very instrumental in promoting its uses; yet increased institutionalization is not without its downside.

In 1987, after Florida had experienced its great success with the early CDS and divorce mediation programs, the Florida Legislature adopted one of the nation's most comprehensive court-connected (read: institutionalized) mediation and arbitration statutes.¹⁵ Trial judges were given the broad discretion to order any civil case to mediation or arbitration subject to Florida Supreme Court rule.¹⁶ The original plan under the 1987 law was to implement a pilot court-connected mediation and arbitration project in one judicial circuit, evaluate the pilot project, and then spread it to all of the other circuits. For a variety of reasons, mediation programs started throughout the state immediately.¹⁷

In 1995, over 75,000 cases were mediated through court-connected mediation, and all twenty judicial circuits in Florida sent some portion of their caseloads to mediation.¹⁸ Mediation now has become an accepted process within the Florida state courts.¹⁹ Much

15. See Act effective Jan. 1, 1988, ch. 87-173, §§ 1-6, 1987 Fla. Laws 1202, 1202-05 (codified as amended in scattered sections of FLA. STAT. ch. 44 (1995 & Supp. 1996)).

16. See *id.* § 2, 1987 Fla. Laws at 1202 (codified as amended at FLA. STAT. § 44.102(2)(a) (Supp. 1996)); see also *In re Proposed Rules for Implementation of Florida Statutes Sections 44.301-.306, Rules of Civil Procedure*, 518 So. 2d 908, 909 (Fla. 1987).

17. The development of private-sector participation in court-connected mediation programs in Florida is actually very interesting. The original statute adopted in 1987 did not preclude the appointment of a mediator paid for by the parties. This was later codified in 1990, when section 44.102(4)(b), *Florida Statutes*, was amended to state that "a mediator may be compensated by the county or by the parties." Act effective Oct. 1, 1990, ch. 90-188, § 2, 1990 Fla. Laws 850, 852 (codified at FLA. STAT. § 44.102(5)(b) (Supp. 1996)). As a result, several entrepreneurial lawyers-turned-mediators actively worked with judges to persuade them to use mediation as a court management tool. When the state budget crisis of the early 1990s struck Florida, it became clear that public (state) funding of mediation was not possible and, as a result of these pioneer efforts, probably not necessary (at least for large, nonfamily civil cases).

18. See SCHULTZ ET AL., *supra* note 7, at v-vii. This number is unrepresentative of the actual number of cases diverted from the courts because statistics are only available for 12 of the 20 judicial circuits in Florida, even though all 20 refer cases to mediation. In addition, the court programs in the 12 circuits that do collect statistics vary in their ability to capture all of the mediated cases in their jurisdictions.

19. The court-ordered arbitration program in Florida has not been as widely received as the mediation program. In 1995, fewer than 60 cases were arbitrated in court-

to my surprise, the mandatory order to mediate has not been heavily litigated in Florida.²⁰ This is interesting to note, especially because the parties in civil cases over \$15,000 are ordered to mediation and typically are ordered to pay the mediator's fees.²¹ I believe one can draw a fair conclusion from the relative lack of litigation that the parties and lawyers who are ordered to mediation are pleased with the process and view it as helpful. In addition, the trend in Florida has been that lawyers increasingly are requesting mediation (rather than waiting to be ordered to mediation) both before and after a lawsuit has been filed.²²

While the heightened awareness of mediation alternatives and the increased use of mediation is a very positive and exciting development in the evolution of our justice system, the natural consequences of this rapid, institutional development have also concerned me. Since 1987, Florida has experienced tremendous growth in the number of rules and laws surrounding the mediation program.²³ From an administrative perspective, each additional rule has been necessary and important in the maturation of the program. Overall, however, I remain concerned about the ultimate effect that additional rules will have on the mediation process,²⁴ i.e., what will hap-

connected programs statewide. See SCHULTZ ET AL., *supra* note 7, at 129. This is largely due to the success of the mediation program. Attorneys prefer mediation because there is almost no downside. Along with their clients, they still retain decisionmaking control over their cases. If neither an attorney nor her client like a potential agreement, they can end the mediation and request a trial. In court-ordered arbitration, on the other hand, the arbitrator will render a decision, and a party/attorney who does not like the decision and requests a trial runs the risk of sanctions if there is not a better outcome at trial. For their part, judges do not care which alternative is used so long as some alternative is tried.

20. See Bruce A. Blitman, *Mediation in Florida: The Newly Emerging Case Law*, FLA. B.J., Oct. 1996, at 44.

21. See SCHULTZ ET AL., *supra* note 7, at 7. Civil cases for less than \$15,000 in damages are typically handled at no charge to the parties. In addition, most judicial circuits in Florida have family (divorce) mediators on staff to handle cases at no charge to the parties or on a sliding scale fee basis that depends on the parties' incomes. See *id.* at 61-62, 68-79.

22. This may be the result of a more sophisticated client base requesting mediation, a perceived ethical duty, see Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 843 (1990), a recognition that the case will be ordered to mediation in any event, or a true commitment to mediation as an appropriate method of resolution.

23. Over the course of eight years, the Florida Supreme Court has adopted rules of procedure governing the mediation and court-ordered arbitration process, see FLA. R. CIV. P. 1.700-.750; FLA. FAM. L.R.P. 12.740-.741, promulgated a code of ethical conduct and grievance procedures for mediators, see FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010-.100, and established qualifications for court mediators and arbitrators, see FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010; FLA. R. CERT. & CT.-APPTD. ARBITRATORS 11.010.

24. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 14 (1986) (stressing the consensual nature of the mediation process); ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 2 (1994) (stressing same).

pen when a flexible process, like mediation, is incorporated into the traditional court process. Which process changes?

A description of some of the recent revisions and additions to the *Florida Statutes* and the Florida Rules of Civil Procedure serves as an ideal way to illustrate this dilemma. In 1988, the Florida Supreme Court adopted qualifications for court mediators.²⁵ To promote use of the qualifications and add to the comfort level of the judges and lawyers who would ultimately be the users of the process, the court relied heavily on previous experience and "paper credentials."²⁶ The national mediation community was outraged by the development of mediator qualification requirements by an institution.²⁷ Nevertheless, if an institution takes the step to order parties who file in court to participate in mediation prior to (or hopefully instead of) obtaining a trial before a judge, doesn't it logically follow that the court has an affirmative obligation to ensure that the individual to whom the case is referred has some expertise? To take it a step fur-

25. Originally found in Florida Rule of Civil Procedure 1.760, the qualifications were moved in 1992 to Florida Rule for Certified and Court-Appointed Mediators 10.010 when the court adopted the code of conduct and grievance procedure for mediators. See *In re Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators*, 604 So. 2d 764, 764-65 (Fla. 1992); see also *In re Florida Rules of Civil Procedure, Florida Rules for Certified & Court-Appointed Mediators, and Proposed Florida Rules for Court-Appointed Arbitrators*, 641 So. 2d 343, 348 (Fla. 1994) (current version). It is important to note that the qualifications for mediators apply only to those who wish to receive referrals from the state court system. To date, there is no title act in Florida regarding mediators; in fact, there are many different qualifications established for mediators who are involved with different types of mediation such as insurance, worker's compensation, and public policy issues. The other statewide office of dispute resolution, the Florida Conflict Resolution Consortium, maintains a roster of individuals available to serve as mediators in public policy, growth management, and environmental disputes. In addition, in 1990, the Florida Supreme Court amended the Florida Rules of Civil Procedure governing mediation to provide parties ordered to mediation with 10 days from the order of referral to select a mediator. See *In re Amendment to Florida Rules of Civil Procedure 1.700-1.780 (Mediation)*, 563 So. 2d 85, 86 (Fla. 1990). Within that initial time period, the parties are free to select a certified mediator or any other individual upon whom the parties can agree. See *id.* at 88.

26. The qualifications for certification as a mediator include: (1) mediation training but no additional educational or experiential requirements for county mediators (initially for civil cases under \$5000 but now includes cases under \$15,000); (2) mediation training and (a) a masters or doctorate degree in a mental health, behavioral, or social science, (b) licensing as a physician in adult or child psychology, or (c) licensing as a CPA or attorney in any U.S. jurisdiction (all with four years of experience in any of the aforementioned fields for family (divorce) mediators); or (3) mediation training and admission to The Florida Bar with five years of Florida legal practice or previous service as a judge from any U.S. jurisdiction for circuit mediators (initially for civil cases above \$5000 but now includes cases above \$15,000 due to an unrelated jurisdictional change of the courts). See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010.

27. See George Nicolau, *Ill-Considered Criteria Endanger Mediation*, SPIDR President Warns, 2 ALTERNATIVE DISP. RESOL. REP. 244, 245 (1988) (discussing Society of Professionals in Dispute Resolution president's criticism of Florida mediation program). For a response to Nicolau, see Sharon Press, *Florida Explains Court Rules in Face of Continuing Controversy*, 2 ALTERNATIVE DISP. RESOL. REP. 434, 434-35 (1988).

ther, wouldn't it be irresponsible, if not negligent, for the courts *not* to develop some method of determining who should mediate for the courts and who should not? I do not see easy answers to these questions. While I am sympathetic to the view that the qualifications originally established by the Florida Supreme Court are not perfect, I do believe that the establishment of mediation as an alternative within the court system brought with it the obligation to provide some means for individuals ordered to mediation to have confidence in their mediator.²⁸ I also believe, based on discussions I have had over the years with judges and attorneys, that mediation would not have succeeded in the court system if the early mediators in large cases were not attorneys.²⁹

This is not to say that the obligation of the court or institution that establishes the program ends with its initial rules and its ability to gain acceptance for the program. On the contrary, I am a strong proponent of the notion that if a court undertakes to institutionalize mediation, it has an ongoing obligation to routinely and systematically review the governing policies, rules, and procedures with an eye toward continual revision. To me, this is a crucial step in preventing the ossification of a flexible process.

In keeping with this continuing obligation, Florida has two standing supreme court committees on mediation and arbitration: the Supreme Court Committee on Mediation and Arbitration Training, created in 1988,³⁰ and the Supreme Court Committee on Mediation and Arbitration Rules, created in 1989.³¹ The training committee is charged with developing and recommending policies and procedures concerning the certification of mediator and arbitrator training programs; reviewing requests from individuals seeking waivers

28. While "paper credentials" are generally considered to be poor indicators of potential success and skill as a mediator, courts must make determinations based upon objective criteria. Subjectively assessing an individual's skills and abilities would place the court in an untenable position. This may ultimately be a reason why courts should not be in the business of "credentialing"; however, in the case of Florida, no one was up to the challenge at the time the program was started. It is my belief that because Florida began a program of mediator certification, the mediation community has taken "credentialing" seriously, and the community has made great strides in the past five years in the area of "credentialing." See, e.g., NATIONAL INST. FOR DISP. RESOL., PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS (1995); SOCIETY OF PROF'LS IN DISP. RESOL., ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE (1995). The State Justice Institute recently awarded to SPIDR and the National Center for State Courts a grant entitled "Principles and Policies to Guide State Courts in Selection, Training, Qualifications and Evaluation of Neutrals."

29. The initial rules allowed the trial judge to choose the alternative process of dispute resolution to which the parties would be ordered and also to select the mediator.

30. See *In re* Special Committee on Mediator and Arbitrator Training, Fla. Admin. Order (Apr. 19, 1988) (on file with Clerk, Fla. Sup. Ct.).

31. See *In re* Special Committee on Mediation and Arbitration Rules, Fla. Admin. Order (July 26, 1989) (on file with Clerk, Fla. Sup. Ct.).

of the qualifications required for arbitrators and mediators; studying the mentorship process in order to recommend procedures and policies for improving it; studying the issue of continuing education and other requirements that may be necessary and proper for certification renewal; and "[a]ssist[ing] the Supreme Court by making other recommendations relating to implementation of the provisions of the rules governing mediator and arbitrator qualifications and training."³² The rules committee is charged with regularly reviewing the mediation rules and statutes and recommending revisions.³³ In addition, the rules committee is charged with making "such other recommendations as would improve the use of mediation or arbitration to supplement the judicial process, as deemed appropriate."³⁴

In 1990, Florida revised its rules to provide for greater party control over the selection of a mediator.³⁵ This rule revision opened the door for parties to select a mediator within the first ten days of referral to mediation. During this time, any mediator could be selected, including one not certified by the Florida Supreme Court. These revisions are an example of a critical step in the evolutionary process of an institutionalized mediation program, namely the obligation to introduce flexibility and choice into the process as it becomes more accepted.

This rule revision, while illustrative, was only one of the recommendations submitted to the supreme court in the three petitions that have been filed since the committee's appointment in 1989. In addition, the Florida Legislature has revised the statute governing mediation and arbitration several times since its adoption in 1987.³⁶

One of the legislative changes adopted provides for "judicial immunity in the same manner and to the same extent as a judge."³⁷ The adoption of such a strong provision, interestingly, was advocated by The Florida Bar in an effort to promote the use of mediation and encourage more individuals to volunteer their services as mediators. The passage of this legislation created a situation that led to the need for the next major set of rules, namely, the Florida Rules for Certified and Court-Appointed Mediators, which contain the stan-

32. *In re* Standing Committee on Mediation and Arbitration Training, Fla. Admin. Order (Feb. 14, 1996) (on file with Clerk, Fla. Sup. Ct.).

33. *See In re* Special Committee on Mediation and Arbitration Rules, Fla. Admin. Order (July 26, 1989) (on file with Clerk, Fla. Sup. Ct.). All other court rules are handled through committees of The Florida Bar, which can only submit revisions as part of a four-year review cycle.

34. *Id.*

35. *See* FLA. R. CIV. P. 1.720(f).

36. *See* Act effective Jan. 1, 1990, ch. 89-31, §§ 1-7, 1989 Fla. Laws 48, 48-50; Act effective Oct. 1, 1990, ch. 90-188, §§ 1-11, 1990 Fla. Laws 850, 850-56; Act effective May 5, 1993, ch. 93-161, §§ 2-5, 1993 Fla. Laws 941, 942-43.

37. FLA. STAT. § 44.107 (1995).

dards of conduct and rules of discipline for supreme-court-certified and court-appointed mediators.

The original legislation establishing the comprehensive mediation program contained a provision that the Florida Supreme Court would establish minimum standards and procedures for professional conduct and discipline.³⁸ However, the adoption of the immunity for mediators provided the real impetus to adopt standards and a disciplinary procedure. Absent such adoption, parties to court-ordered mediation had no redress for inappropriate mediator behavior. In addition, Florida mediators had been the subject of ethics research conducted by Professor Robert A. Baruch Bush.³⁹ One of the important conclusions that Bush found was that

the findings reported here are cause for concern and caution. For mediators' interest in good practice, however encouraging, will not be enough by itself to guarantee the responsible handling of the numerous and difficult dilemmas described above. The mediators themselves know this. They need guidance: training, standards, supervision, etc. And that guidance must come from policy makers—at the program, the state, and the national level. The real cause for concern is not what mediators are doing, but what policy makers are doing—or rather, not doing.⁴⁰

With such a backdrop, one can readily appreciate the need for the development of standards of conduct. In 1992, the Florida Supreme Court adopted such a code of conduct and a means for enforcing the standards.⁴¹ I was at the forefront in urging the supreme court to establish a committee to draft standards, providing staff support to the rules committee in its drafting efforts and anxiously awaiting adoption of the standards. However, I remain concerned about the impact that these standards will have on the process. I come back again to the overriding concern that mediation is a flexible process and that adoption of a code of conduct will somehow rigidify the process. If the standards are written broadly to allow for the subtle nuances of an individual situation, might they then offer no real guidance to mediators in discharging their duties? If they are written very specifically, might they then inhibit a mediator's ability to handle each situation creatively?

A concrete example of how the standards might change the practice of mediation in an unintended manner is in the simple practice

38. See Act effective Jan. 1, 1988, ch. 87-173, § 6, 1987 Fla. Laws 1202, 1205 (codified as amended at FLA. STAT. § 44.106 (1995)).

39. See ROBERT A. BARUCH BUSH, NATIONAL INST. FOR DISP. RESOL., *THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS* (1992).

40. *Id.* at 30.

41. See *In re Proposed Standards of Professional Conduct for Certified and Court-Appointed Mediators*, 604 So. 2d 764, 764-65 (Fla. 1992).

relating to the retention of notes. Because communication in court-connected mediation is privileged and cannot be disclosed absent a waiver of the privilege by all parties to the mediation,⁴² mediators typically do not retain notes from concluded mediation sessions. In fact, in the past, most trainers recommended to student mediators that they not retain notes. Will the adoption of a standard of conduct and the potential for a grievance being filed cause mediators not only to keep notes of their sessions, but also to request that parties sign off on statements that say they were fully capable of participating or that they were aware of their legal rights and were still desirous of pursuing this mediated agreement? I wonder whether changes in these procedures will cause a greater underlying change in the way mediation is conducted. Will the need to cover oneself override a mediator's creativity? Will it lead to more party refusals to mediate? If so, maybe those were cases that should not have been mediated in any event.

After more than four years of experience under the mediator code of conduct and grievance system, we are starting to see some trends. While the number of grievances filed remains extremely low (only twenty have been filed statewide), we learned that the original grievance procedure did not provide for enough front-end investigation and confidentiality protection. The rules were amended in 1995 to address those concerns.⁴³ The revised rules provide many opportunities for the grievance to be resolved short of a hearing—namely, the nonadjudicative resolution of a grievance by having the mediator and complainant meet with the complaint committee in an effort to resolve the matter. During such a meeting, the mediator may accept sanctions.⁴⁴ In addition, an analysis of the grievances filed shows common concerns, namely the failure of the mediator either to allow the parties to exercise self-determination,⁴⁵ to act impartially,⁴⁶ or to refrain from providing professional advice.⁴⁷ A summary of the grievances that have been filed is published in the DRC newsletter, *The Resolution Report*, for educational purposes.⁴⁸ The hope is that this formal (institutional) process of handling grievances will enable mediators to better understand their role in the process and prevent inadvertent inappropriate behavior.⁴⁹

42. See FLA. STAT. § 44.102(3) (Supp. 1996).

43. See *In re Amendments to the Florida Rules for Certified & Court-Appointed Mediators*, 661 So. 2d 807 (Fla. 1995).

44. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.220.

45. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.060.

46. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.070.

47. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.090.

48. *The Resolution Report* is a publication of the Florida Dispute Resolution Center.

49. In 1994, the court amended the Florida Rules for Certified and Court-Appointed Mediators to create the Mediator Qualifications Advisory Panel, which provides advisory

Another example of the effect institutionalization has had on the mediation process relates to the training of mediators. The original statute contained a mandate that the Florida Supreme Court adopt minimum standards for mediation and arbitration training programs.⁵⁰ In 1989, the Florida Supreme Court adopted mediation training program standards for the three types of court-connected mediation: county (civil cases under \$15,000); family (divorce cases); and circuit (civil cases above \$15,000).⁵¹ The standards included requirements on subject matter, trainer qualifications, and student-faculty ratios.⁵²

Some training providers argued that the training program standards did not allow for enough flexibility in designing and conducting the training program. The supreme court committee charged with enforcing the standards found that they allowed for too much flexibility and as such were difficult to enforce.⁵³ Once again, the issue of the institution's responsibility to ensure quality was pitted against the need to retain the flexibility of the process. It stands to reason that if the Florida Supreme Court requires an individual to complete a mediation training course before that individual can be certified, then the court has some obligation to the participants in the training program to ensure that the program is of high quality. By extension, if the court believes that mediation training is an important prerequisite to becoming a mediator, presumably there is some expectation of what will happen during that training program. Clearly, a forty-hour program in which the participants merely share thoughts about life or listen to litigation "war stories" would not provide any basis for the court to have confidence that the participants understand the mediation process or how to provide mediation services. Yet how far should the institution go? Research in the area of mediation training and the effect such training has on a mediator's ability is scant.⁵⁴ Studies that have attempted to address the relationship training has to subsequent performance have produced mixed results. Based upon this incomplete and inconclusive information, should an institution provide mandates? By providing a man-

ethics opinions to mediators who have questions about the standards of conduct. See *In re Florida Rules of Civil Procedure, Florida Rules for Certified & Court-Appointed Mediators, and Proposed Florida Rules for Court-Appointed Arbitrators*, 641 So. 2d 343, 351 (Fla. 1994).

50. See FLA. STAT. § 44.106 (1987).

51. See *In re Rules Governing Qualifications for Mediators*, Fla. Admin. Order (July 7, 1989) (on file with Clerk, Fla. Sup. Ct.).

52. See *id.*

53. See Internal Dispute Resolution Center Memorandum on Training Standards 3 (on file with author).

54. See Margaret Shaw, *Selection, Training, and Qualifications of Neutrals*, in NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 155 (Susan Keilitz ed., 1994).

date, does the institution in essence concretize an area that is still developing and potentially inhibit innovative means of preparing mediators for what lies ahead?

In 1995, the Florida Supreme Court adopted the second generation of training program standards for certified mediation training programs.⁵⁵ Theoretically, the standards provide clearer direction as to what needs to happen during the training program, while providing greater flexibility for the trainers to accomplish the tasks. This was accomplished by a move away from standards based on strict hour requirements and towards learning objectives that must be completed. Because the standards are so new, there is little experience to suggest whether our greatest fears or expectations for the standards will be realized.⁵⁶

The most recent discussions of the training committee have centered around the need for continuing mediator education. Once a court embarks on the road of certification, doesn't the court then retain some responsibility to ensure continuing competence? This point has crystallized in Florida now that nine years have passed since the institution of certification requirements. Specifically, an individual could have completed a supreme-court-certified mediation training program in 1988 and obtained certification. During the last nine years, this individual may never have been selected or appointed as a mediator and may not have taken any continuing mediator education. In short, he or she may not even remember how to mediate. Yet this individual remains a "certified" mediator.⁵⁷ If one accepts the premise presented earlier in this paper that once the court mandates mediation, the court bears some responsibility to identify competent mediators, then arguably the court bears the responsibility to ensure that competence is maintained. One method would be to require continuing mediator education. The specifics on how the requirements would be established are still being debated. Once again, we find ourselves revisiting the balancing of how much bureaucracy and institutionalization is necessary to achieve the desired end.

A final concern that I would like to raise on this issue is one for which I am completely without data to confirm or dispel. However, it seems fitting to include some thoughts on the impact the next generation will have in the institutional context. When I joined the Dis-

55. See *In re Mediation Training Standards and Procedures*, Fla. Admin. Order (Dec. 1, 1995) (on file with Clerk, Fla. Sup. Ct.).

56. The training program standards also contain a procedure by which complaints can be lodged against training programs that will be reviewed by a 16-member Mediation Training Review Board.

57. To retain certification as a mediator in Virginia, an individual must complete continuing mediator education as well as practice requirements. See OFFICE OF THE EXECUTIVE SECRETARY, SUPREME COURT OF VA., GUIDELINES FOR THE TRAINING AND CERTIFICATION OF COURT-REFERRED MEDIATORS 5 (1995).

pute Resolution Center in 1988, I expected that I would remain somewhere between three to five years because, in my mind, the challenge and excitement of the position was the ability to create a new program. I thought that the job would quickly lose my interest when it became routine, i.e., when my major functions shifted from policy development to policy implementation. Unlike many others who come to work for a state court system, my goal was not to move up through the court bureaucracy, but rather to pursue the development of a comprehensive mediation program—in other words, to change the way justice was delivered in our court system through the adoption of mediation alternatives. However, the revision of my three-to-five-year time frame has more to do with a mistaken notion on my part of how long it would take for the policy development phase of the program to conclude rather than a reassessment that I truly enjoy running a bureaucracy. Each year has brought new challenges and more policy development decisions to be made, and despite an increased level of administrative duties, the bulk of my activity remains in the creative, innovative areas.

Thus, I still remain committed to moving on when the administrative side of the job outweighs the creative side. This leads me to my final concern, namely, what happens to these programs when the second generation of program administrator comes in? Clearly, the type of individual who will be attracted to such a position will not be a "mediator type"—such an individual would no more wish to handle the bureaucracy than I would. More likely, the second generation of program administrator will be one who does not necessarily have any particular commitment to a mediation program, but rather is interested in career court administration.

When the program was small, I interacted with individuals on a one-to-one basis. In fact, in the early days of the program, I knew all of the certified mediators. Now that we maintain a database that contains over 8000 individuals who have completed mediation training and approximately 4500 certified mediators, I no longer know everyone personally. It has been my commitment, however, to maintain a "good" bureaucracy—if an individual calls, we will explain the policy or procedure and the rationale for it rather than just say, "That's the policy, period." It has been my commitment to run the DRC using all of the positive lessons that I have learned from being trained and serving as a mediator. Will the next generation bring that same commitment? As the office grows in numbers (a necessary outgrowth of increased institutionalization), will everyone be able to answer all of the questions that arise? When the rules become so numerous, will the answer increasingly be, "That's what the rule says—we have no flexibility in this area"?

In sum, I believe that the institutionalization of mediation programs has served a worthwhile purpose. It is only with institutionalization that we are able to achieve the increased attention and high level of debate around these issues. I have seen first hand, both through my experiences in the school system and in the courts, how helpful—and transforming—these programs can be. I know that most people still are not very sophisticated in thinking through their options for resolving disputes. In the school setting, students frequently view their options as limited to ignoring the situation, telling a teacher or other authority, or fighting it out. For adults, the choices are surprisingly similar: ignoring the conflict, appealing to the authority of the courts, or fighting it out. For too long, the metaphors have been those of “The People’s Court”: “Don’t take it into your own hands, take them to court,” rather than, “You have the capability of resolving your disputes yourself.” Institutionalization provides necessary legitimacy and widespread utilization to a process that is only useful if one knows about it. One can only make informed decisions about whether to use mediation if one is aware that the process exists.

Perhaps continued discussion of institutionalization—both the positive and negative aspects—will prevent some of the dangers I discussed from occurring. I believe that we all have an obligation, as “the next generation” takes over, to focus our attention on and critically analyze the impact of the processes we have set in motion—particularly the institutionalization of mediation. It is only with vigilance that we will determine if institutionalization is the “savior” or the “saboteur” of the mediation process.

